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16 AMAZON.COM, INC.

17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO COURTHOUSE

20 MASTEROBJECTS, INC.,

21 Plaintiff,

22 vs.

23 AMAZON.COM, INC.,

24 Defendant.

Case No. 3:20-cv-08103-WHA

Judge William Alsup
Courtroom: 12

**DEFENDANT AMAZON.COM, INC.'S
RESPONSE TO REQUEST FOR
INFORMATION RE PROTECTIVE ORDER
FOR 2011 LITIGATION, ECF 353**

Complaint Filed: May 5, 2020
Trial Date: October 17, 2022

1 Amazon.com, Inc. (“Amazon”) hereby responds to the Court’s request for information, ECF
2 353. The Court’s request for information is directed to a July 20, 2011 email in which Attorney
3 Nelson summarizes for his client, Mr. Smit, what he learned about Amazon’s autocomplete system
4 during what all sides agree was a confidential July 19, 2011 Webex meeting between attorneys for
5 the parties. The Court has asked why that email states that it is providing information only at a “high
6 level.” ECF 353. The Court has asked whether Mr. Smit was not then entitled to receive Amazon’s
7 confidential information. *Id.* In particular, the Court has asked the parties whether Mr. Smit had at
8 that time signed onto the protective order for the 2011 litigation. *Id.*

9 The only explanation from MasterObjects on this topic to date appears in the signed
10 declaration of Mr. Nelson submitted in response to Amazon’s motion for terminating sanctions:



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16 ECF 295-23 (emphasis added). This explanation, [REDACTED]

17 [REDACTED] makes little sense.

18 This explanation is also contradicted by the strong language Mr. Nelson used in the more
19 detailed summary of the July 19, 2011 Webex that he distributed to his legal team on the same day.
20 In that more detailed summary, Mr. Nelson wrote: [REDACTED]

21 [REDACTED] ECF 345-2 (Ex. A to Amazon’s Surreply ISO Motion for Terminating
22 Sanctions) at 1. This language suggests that, during the Webex meeting itself, Amazon conveyed to
23 Mr. Nelson that the Amazon documents shown during that meeting were Highly Confidential under
24 the Model Protective Order then in effect. This would make sense, given the highly detailed, highly
25 confidential nature of the documents shown. *See* ECF 344-3 (Ex. A to Amazon’s Surreply) at 2
26 (reproducing a snip of an Amazon document); ECF 344-4 (Ex. B to Amazon’s Surreply) (underlying
27 Amazon document).

28 Amazon has previously raised the question of whether Mr. Smit had signed onto the

1 protective order for the 2011 litigation:

2 MasterObjects argues that its counsel was allowed to share Amazon
3 confidential information with Mr. Smit. *See* Dkt. 295 at 15-16. That may
4 be so, *if* Mr. Smit had signed the “Acknowledgement and Agreement to be
5 Bound” required by the Model Protective Order for “the officers, directors
6 ,and employees” of a party receiving confidential information. Dkt. 295 at
7 15 (quoting Rayburn Decl., Ex. 7, § 7.2(b)). But MasterObjects has not
8 shown that Mr. Smit did so. Nor has MasterObjects shown that Mr. Fliesler,
9 [who] was on MasterObjects’ board [and also received the July 20, 2011
10 email] did so. Nor has MasterObjects made any attempt to explain why it
11 was proper for Mr. Hassebrock—who was *not* then an officer, director, or
12 employee of MasterObjects, Dkt. 295 at 6—to receive this information.

13 ECF 305-3 (Amazon’s Reply re Motion for Terminating Sanctions) at 5:11-22. MasterObjects has,
14 to date, never: (1) produced any protective order signed by Mr. Smit, or (2) represented that Mr. Smit
15 signed such a protective order. In fact, when Amazon asked Mr. Smit, during deposition, whether
16 he had signed a protective order for the 2011 case, [REDACTED]

17 [REDACTED]

9	[REDACTED]
10	[REDACTED]
11	[REDACTED]
12	MR. ATKINSON: [REDACTED]
13	[REDACTED]

18 5/4/2022 Smit Tr. at 57:9-13.

19 Thus, the most likely explanations for the framing of Mr. Nelson’s email are: (1) Amazon
20 had expressed to Mr. Nelson that the information was Highly Confidential, rather than just
21 Confidential, under the Model Protective Order; (2) Mr. Smit (and Mr. Fliesler and Mr. Hassebrock)
22 had *not* signed the relevant protective order undertaking; or (3) both. Either way, the July 20, 2011
23 email would be improper. The then-governing Model Protective Order did not allow Highly
24 Confidential information to be distributed to the opposing party’s CEO. *See* ECF 280-9 (2011
25 Interim Model Protective Order) § 7.3. Nor did it allow the distribution of Confidential information
26 to a person who had not signed the protective order. *Id.* § 7.2. And, as Amazon has explained, Mr.
27 Nelson’s July 20, 2011 email to Mr. Smit includes important Amazon confidential information that
28 Mr. Nelson only obtained via the Webex meeting. *See* ECF 305-3 (Amazon’s Reply ISO Motion for

1 Terminating Sanctions) at 3-5; ECF 345-1 (Amazon's Surreply ISO Motion for Terminating
2 Sanctions) at 1-2. Finally, Mr. Smit has himself testified that he received Amazon confidential
3 information from Mr. Nelson and used it to guide the prosecution of the Patents-in-Suit. ECF 279-3
4 (Amazon's Motion for Terminating Sanctions) at 7-10.

5 Even if Mr. Smit *had* signed the governing protective order, and the information shared
6 during the Webex meeting *was* designated only Confidential, Mr. Nelson may have (unsuccessfully)
7 attempted to limit the information conveyed because he knew that the July 19, 2011 Webex meeting
8 was subject to more constraints than just the district's Model Protective Order. Specifically, the
9 parties had agreed that the information conveyed during that meeting was "confidential and protected
10 as confidential, will not be used in prosecution, protected under 408, and will only be used for
11 settlement conversations." ECF 278-8 (Ex. B to Chatterjee Decl. ISO Motion for Terminating
12 Sanctions).

13 As of June 2011, Mr. Nelson was aware that Mr. Smit was actively prosecuting patents in the
14 same patent family. *See, e.g.*, ECF 279-3 at 14 (graphic of patent family, depicting multiple live
15 patent prosecutions as of June 2011). As such, he may have been trying to avoid a situation where—
16 contrary to the parties' express agreement—Mr. Smit used the information from the Webex meeting
17 for future patent prosecution efforts. To the extent that was Mr. Nelson's intention, he failed. As
18 Amazon has shown, Mr. Smit spent the next decade parsing the information that Amazon had
19 conveyed in the July 19, 2011 Webex meeting to guide his patent prosecution efforts, thus violating
20 the parties' express agreement. ECF 345-1 (Amazon's Surreply ISO Motion for Terminating
21 Sanctions) at 2-5. He admitted as much. ECF 279-3 (Amazon's Motion for Terminating Sanctions)
22 at 7-10.

23 Amazon thanks the Court for its time and attention to this important issue.

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25 Dated: June 13, 2022

HUESTON HENNIGAN LLP

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27 By: /s/ Christina V. Rayburn
Christina V. Rayburn

28 Attorneys for Defendant

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AMAZON.COM, INC.